

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SONY BMG MUSIC  
ENTERTAINMENT, et al,

Plaintiffs,

v.

BRITTANY RAQUEL GRAY

Defendant.

No. C 07-4854 WDB

**ORDER FOR REASSIGNMENT AND  
REPORT AND  
RECOMMENDATION RE  
APPLICATION FOR DEFAULT  
JUDGMENT**

Plaintiffs Sony BMG Music Entertainment, Arista Records LLC, Interscope Records, BMG Music, UMG Recordings, Inc., and Warner Bros. Records, Inc., are copyright owners or licensees with respect to certain copyrighted sound recordings. Complaint, filed February 4, 2008, at 1-2. Defendant Brittany Gray is an individual residing in Daly City, California. *Id.*

On February 4, 2008, plaintiffs filed their complaint against Ms. Gray alleging that plaintiffs are the owners of copyrights in eight identified sound recordings ("Copyrighted Recordings") and that Ms. Gray has violated and continues to violate exclusive rights granted to plaintiffs in violation of the Copyright Act. See, Complaint at 3 and Ex. A. Specifically, plaintiffs allege that Ms. Gray has violated plaintiffs' exclusive rights to reproduce and to distribute the

1 Copyrighted Recordings by using the internet to download from and/or upload to a  
2 "peer to peer" file sharing network. 17 U.S.C. §106(1) and (3); Complaint at 2-3.

3 Plaintiffs served Ms. Gray with a copy of the Complaint on February 24,  
4 2008. See, Proof of Service filed March 10, 2008.

5 In response to plaintiffs' application for entry of default, the Clerk of the  
6 Court entered default as to Brittany Raquel Gray on June 4, 2008.

7 On July 21, 2008, plaintiffs filed and served their Motion for Default  
8 Judgment Against Defendant Brittany Raquel Gray ("Motion"). See, Proof of  
9 Service, attached to Motion. Plaintiffs notified defendant that this Court would  
10 conduct a hearing on September 10, 2008, in connection with the Motion for  
11 Default Judgment. Motion at 1.

12 On September 10, 2008, the Court conducted a hearing in connection with  
13 plaintiffs' Motion. No appearance was made on behalf of defendant.

14 Plaintiffs seek judgment against Ms. Gray in the amount \$6,000.00,  
15 representing statutory damages for copyright infringement of eight works and costs  
16 in the amount \$420. 17 U.S.C. §§504 and 505. See also, Declaration of Dawniell  
17 Alise Zavala, filed July 21, 2008, ("Zavala Decl.") at 16; Motion at 7-8 and 13.  
18 Plaintiffs also ask the Court to issue a permanent injunction prohibiting Ms. Gray  
19 from infringing plaintiffs' rights in copyrighted recordings owned by plaintiffs now  
20 or in the future and directing Ms. Gray to destroy all copies of plaintiffs' recordings  
21 that defendant has downloaded without authorization. 17 U.S.C. §§502(a) and  
22 503. See also, Complaint at 4.

23 Because defendant Brittany Gray has not appeared in this action, this Court  
24 has not secured consent as required by 28 U.S.C. §636(c). Accordingly, we make  
25 the following Report and Recommendation and ORDER the Clerk of the Court to  
26 randomly reassign this action to a District Judge.

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1     **I. Entitlement to Entry of Default Judgment**

2           Plaintiffs seek entry of judgment by default against Brittany Raquel Gray.  
3           Plaintiffs served defendant with their motion for default judgment. See,  
4     Proof of Service, filed on July 21, 2008.

5           Ms. Gray has failed to respond to the Complaint or otherwise to appear in  
6     the proceedings, and the Clerk of the Court entered default as to this defendant.

7           Plaintiffs' counsel has communicated directly with Ms. Gray, who is aware  
8     of this action yet still has chosen not to appear. Zavala Decl., at ¶8-12. This fact  
9     supports a finding that Ms. Gray has chosen not to defend this action and strongly  
10    supports plaintiffs' request for judgment by default.

11          To demonstrate direct infringement plaintiffs must satisfy two requirements:  
12    (1) they must prove ownership of the copyright and (2) they must prove that  
13    defendant's conduct violates at least one exclusive right granted under 17 U.S.C.  
14    §106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir 2001). By  
15    failing to respond to plaintiffs' Complaint, defendant admits all of the well-pleaded  
16    allegations of the Complaint relating to liability. Plaintiffs have alleged that they  
17    are the owners of copyrights in the eight sound recordings listed in Exhibit A to the  
18    Complaint. Plaintiffs also allege that defendant has used "a [peer to peer] network  
19    to download and/or distribute to the public the Copyrighted Recordings."  
20    Complaint at 3. Moreover, plaintiffs have produced evidence indicating that their  
21    investigator, MediaSentry, Inc., was able to obtain a list of sound recordings  
22    offered by defendant to the public and that MediaSentry actually downloaded the  
23    eight sound recordings at issue. Plaintiffs' evidence, uncontradicted by virtue of  
24    defendant's default, establishes the substantive merits of plaintiffs' claim that  
25    defendant distributed the Copyrighted Recordings to the public.

26          The Court also finds that there is a significant risk of prejudice to plaintiffs if  
27    their Motion is denied. Use of the internet to distribute copyrighted sound  
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1 recordings via file sharing has the potential to cause widespread damage to  
2 plaintiffs' rights. Ms. Gray may have infringed plaintiffs' rights in additional  
3 copyrighted recordings (beyond the eight at issue in the Complaint) and has not  
4 presented any basis for a belief that she has ceased participating in file sharing over  
5 a peer to peer network. Zavala Decl., at ¶3; Transcript of September 10, 2008  
6 hearing. These contentions are un rebutted by Ms. Gray.

7 The evidence supports a finding that Ms. Gray is not a minor or otherwise  
8 incompetent and is not on active duty military service. Zavala Decl., at ¶15. Given  
9 Ms. Gray's knowledge of plaintiffs' claims and of these proceedings, her complete  
10 failure to appear, and the significant risk of prejudice to plaintiffs resulting from  
11 the alleged breach, the sufficiency of plaintiffs' complaint, and the apparent merit  
12 of plaintiffs' substantive claim, we RECOMMEND that the District Judge to whom  
13 this case is reassigned find that plaintiffs are entitled to judgment by default against  
14 Brittany Raquel Gray. See, F.R.C.P. 55(b); Eitel v. McCool, 782 F.2d 1470 (9th  
15 Cir. 1986).

## 16 17 **II. Specific Items of Relief Sought by Plaintiffs**

### 18 **A. Statutory Damages under the Copyright Act**

19 Plaintiffs may collect, at their election, either actual damages or statutory  
20 damages. 17 U.S.C. §504. Plaintiffs have elected to recover statutory damages.  
21 Motion at 4 and 7-8. The Copyright Act provides for statutory damages in an  
22 amount not less than \$750.00 and not more than \$30,000.00 per infringed work. 17  
23 U.S.C. §504(c)(1). Plaintiffs seek the minimum statutory damages of \$750.00 for  
24 each of the eight infringed works, i.e., \$6,000.00.<sup>1</sup> Motion at 7-8.

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26 <sup>1</sup>Plaintiffs allege that defendant's infringement was willful. Complaint at ¶19. Pursuant  
27 to 17 U.S.C. §504(c)(2), the Court may award statutory damages up to \$150,000.00 where  
28 plaintiff has proven willfulness. Because plaintiffs seek only the minimum statutory damages,  
the Court need not consider the allegations of willfulness.

1 Plaintiffs have presented evidence, uncontradicted by virtue of defendant's  
2 default, that would support a finding that defendant has infringed plaintiffs' rights  
3 in eight copyrighted works. Complaint at 2-4 and Ex. A; Zavala Decl., at ¶5.

4 Accordingly, we RECOMMEND that the District Judge to whom this case is  
5 reassigned enter a judgment for plaintiffs and against defendant Brittany Gray that  
6 includes statutory damages totaling \$6,000.00 (six thousand dollars).

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8 **B. Costs**

9 The Copyright Act confers in the Court discretion to award a prevailing  
10 plaintiff its costs including reasonable attorneys' fees. 17 U.S.C. §505. Plaintiffs  
11 ask the Court to reimburse their costs in the amount \$420.00, reflecting the Court's  
12 filing fee and the cost of obtaining personal service of the Summons and  
13 Complaint. Zavala Decl., at ¶16. Plaintiffs do not seek reimbursement of their  
14 attorneys' fees.

15 The items for which reimbursement is sought constitute taxable costs. Civil  
16 L.R. 54-3(a). We may take judicial notice of the Court's filing fee. We also find,  
17 based on the Court's extensive experience with litigants' requests for  
18 reimbursement of costs, that the cost incurred to obtain personal service of the  
19 Summons and Complaint is commensurate with rates charged by process servers in  
20 the Bay Area.

21 Accordingly, we RECOMMEND that the District Judge to whom this case is  
22 reassigned enter a judgment in favor of plaintiffs and against defendant Brittany  
23 Gray that includes costs in the amount \$420.00 (four hundred twenty dollars).

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25 **C. Request for Permanent Injunction**

26 Plaintiffs ask the Court to enter judgment enjoining defendant Brittany Gray  
27 from infringing plaintiffs' rights in current and future sound recordings and  
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1 compelling defendant to destroy all copies of sound recordings that she has  
 2 downloaded without authorization. 17 U.S.C. §502(a) and §503. See also, Olan  
 3 Mills, Inc., v. Linn Photo Co., 23 F.3d 1345, 1349 (8th Cir. 1994) (courts enjoin  
 4 infringement of future works where there has been history of continuing  
 5 infringement and threat of future infringement remains).

6 Specifically, plaintiffs seek entry of the following injunction:

7 Defendant shall be and hereby is enjoined from directly or indirectly  
 8 infringing Plaintiffs' rights under federal or state law in the  
 9 Copyrighted Recordings and any sound recording, whether now in  
 10 existence or later created, that is owned or controlled by Plaintiffs (or  
 11 any parent, subsidiary, or affiliate record label of Plaintiffs)  
 12 ("Plaintiffs' Recordings"), including without limitation by using the  
 13 Internet or any online media distribution system to reproduce (i.e.,  
 14 download) any of Plaintiffs' Recordings, to distribute (i.e., upload)  
 15 any of Plaintiff's Recordings, or to make any of Plaintiffs' Recordings  
 16 available for distribution to the public, except pursuant to a lawful  
 17 license or with the express authority of Plaintiffs. Defendant also  
 18 shall destroy all copies of Plaintiffs' Recordings that Defendant has  
 19 downloaded onto any computer hard drive or server without  
 20 Plaintiffs' authorization and shall destroy all copies of those  
 21 downloaded recordings transferred onto any physical medium or  
 22 device in Defendant's possession, custody or control.

23 Complaint at 4.<sup>2</sup>

24 Courts determining whether to issue a permanent injunction consider the  
 25 following equitable factors: "(1) that [the plaintiff] has suffered an irreparable  
 26 injury; (2) that remedies available at law, such as monetary damages, are  
 27 inadequate to compensate for that injury; (3) that, considering the balance of  
 28 hardships between the plaintiff and defendant, a remedy in equity is warranted; and  
 (4) that the public interest would not be disserved by a permanent injunction."  
eBay, Inc. v. MercExchange L.L.C., 547 U.S. 388 (2006) (claim for patent  
 infringement).

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<sup>2</sup>The text of the requested injunction set forth in plaintiffs' motion differs slightly from the version set forth in the Complaint. At the hearing on September 10, 2008, plaintiffs' counsel represented that the inconsistencies likely were unintentional and that the text set forth in the Complaint was satisfactory to plaintiffs. Transcript of September 10, 2008 hearing.

1 Plaintiffs have established liability by virtue of defendant's default. In the  
2 case of file sharing over the internet damages are potentially widespread and  
3 substantial. Moreover, damages for violation of these kinds of rights are inherently  
4 difficult to value. While the magnitude of harm that internet file sharing  
5 potentially could create is great and difficult to quantify, the risk of harm to  
6 defendant that would be created by issuance of the injunction is small. Ms. Gray  
7 will be required to pay a relatively modest amount to buy the music she wants.  
8 Furthermore, the public interest in protecting copyrighted material in order to  
9 encourage artistic expression will be served. Therefore, if plaintiffs have  
10 demonstrated a significant threat of future violations this Court will recommend  
11 that the injunction issue.<sup>3</sup>

12 Defendant has not appeared in this action. Although she responded to  
13 plaintiffs' early efforts to contact her and apparently agreed to settle plaintiffs'  
14 action, Ms. Gray never executed the settlement documents. Her refusal to execute  
15 the settlement documents supports a concern that she might well intend to ignore  
16 plaintiffs' requests that she cease violating their rights. Accordingly, neither  
17 plaintiffs nor the Court can have any assurance that Ms. Gray will cease her  
18 infringing behavior. In addition, the Court has been given no reason to conclude  
19 that defendant has uninstalled from her computer the software that permits her to  
20 file share sound recordings via the internet. Given all of these factors, the Court  
21 concludes that plaintiffs have demonstrated a significant risk that defendant will  
22 continue to violate the copyright laws by the unauthorized file sharing of plaintiff's  
23 sound recordings over the internet.

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26 <sup>3</sup>See, cases pre-dating eBay: MAI Systems Corp., v. Peak Computers, 991 F.2d 511, 520  
27 (9th Cir. 1993) (Courts will grant a request for a permanent injunction under the Copyright Act  
28 where there has been a showing of liability and a threat of future violations.); Sega Ent. Ltd., v.  
MAPHIA, et al, 948 F.Supp. 923, 940 (N.D.Cal. 1996) (same).



We RECOMMEND that the District Judge enter the injunction set forth above and in the Compliant at 4:13-21.

### **III. Conclusion**

The court ORDERS the Clerk of the Court to randomly reassign this action to a District Judge.

A copy of this court's Proposed Judgment is attached hereto.

We RECOMMEND that the District Judge to whom the Clerk reassigns this matter enter judgment in favor of plaintiffs and against defendant Brittany Raquel Gray for statutory damages and costs in the total amount of \$6,420.00 (six thousand four hundred twenty dollars).

We also RECOMMEND that the District Court enter the following injunction:

Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiff's Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody or control.

**The Court ORDERS plaintiffs to promptly serve a copy of this Report and Recommendation on Brittany Raquel Gray.**

IT IS SO REPORTED AND RECOMMENDED.

Dated: September 15, 2008

  
 WAYNE D. BRAZIL  
 United States Magistrate Judge

Copies to: Plaintiffs with instructions to serve defendant, WDB, stats, Clerk.